Public Prosecutor v Wan Hasrul Nizam bin Wan Hizamuddin

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42H-45–06 OF 2016
ZULKIFLI BAKAR J
10 JANUARY 2017

Criminal Procedure — Appeal — Appeal against sentence — Respondent pleaded guilty to charge under s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 — Respondent released by sessions court judge ('SCJ') on bond of good behavior for period of five years with one surety and security of RM3,000 — Whether learned SCJ failed to consider public interests — Whether SCJ considered mitigating factors — Whether SCJ rightly considered rehabilitative potential of respondent — Whether order made by SCJ in releasing respondent with bond of good behavior under s 294 of the Criminal Procedure Code sufficient and appropriate — Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 6(1) — Criminal Procedure Code s 294

The respondent was charged at the sessions court under s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 and the respondent had pleaded guilty to the said charge. The respondent was then released on bond of good behaviour under s 294(1) of the Criminal Procedure Code ('the Code') for a period of five years commencing from 2 June 2016 with one surety and providing security of RM3,000. The present appeal was filed by the appellant against the inadequacy of the sentence/order imposed by the learned sessions court judge ('the SCJ'). The appellant submitted that there was failure of the learned SCJ in not taking into account the public interests when imposing the said sentence or order.

Held, dismissing the appeal and affirming the order made by the learned SCJ:

(1) The court found no reason to interfere with the discretion exercised by the learned SCJ sparingly in passing the sentence since the appellant failed to prove that the discretion in question was exercised unjustly and injurious to the public interests. 'Interest of the public' is best served not merely by imposing custodial sentence as spelled out in the legislations but by encouragement to induce the offender to turn from criminal ways to honest living (see paras 10–11).

(2) The argument advanced by the appellant in relation to the motorcycle ridden by the respondent was reported to be stolen could not be accepted as a relevant factor to be considered in the exercise of imposing sentence for the present case since the respondent was not charged in respect of the

said motorcycle and there was no findings of guilt or conviction against the respondent for any offence related to the said motorcycle (see para 17).

(3) The learned SCJ had correctly considered the plea of guilty and the respondent being a first offender as relevant mitigating factors. The court was persuaded by two essential mitigating factors which were: the respondent was not a hardened criminal since he had no previous criminal antecedents; and the purpose (though unlawful) was due to the fear potrayed by the respondent as a victim who assimilates a previous painful experience of trauma of being robbed whilst earning a living. Thus, in order to achieve the right balance between deterrence and rehabilitation, the learned SCJ had rightly considered the rehabilitative potential of the respondent (see paras 16 & 20).

(4) The order made by the learned SCJ in releasing the respondent with bond of good behavior under s 294 of the Code was sufficient and appropriate in the circumstances of the present case as it also gives a lesson to the respondent and to educate him not to bring or have in possession of the dangerous weapon in public without authorisation or lawful purpose (see para 19).

[Bahasa Malaysia summary

Responden dituduh di mahkamah sesyen di bawah s 6(1) Akta Bahan-Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 dan responden telah mengaku bersalah terhadap tuduhan tersebut. Responden kemudiannya dilepaskan atas jaminan berkelakuan baik di bawah s 294(1) Kanun Tatacara Jenayah ('Kanun') bagi tempoh lima tahun bermula dari 2 Jun 2016 dengan satu penjamin memberikan jaminan sebanyak RM3,000. Rayuan ini difailkan oleh perayu terhadap hukuman yang tidak mencukupi/perintah yang dikenakan oleh hakim mahkamah sesyen yang bijaksana ('HMS'). Perayu berhujah bahawa terdapat kegagalan oleh HMS yang bijaksana kerana tidak mengambil kira kepentingan awam apabila mengenakan hukuman atau perintah tersebut.

Diputuskan, menolak rayuan dan mengesahkan perintah yang dibuat oleh HMS yang bijaksana:

(1) Mahkamah mendapati tiada alasan untuk campur tangan dengan budi bicara yang dijalankan oleh HMS yang bijaksana berhati-hati dalam menjatuhkan hukuman memandangkan perayu gagal untuk membuktikan bahawa budi bicara yang dipersoalkan dijalankan secara tidak adil dan memudaratkan kepada kepentingan awam. 'Interest of the public' dijalankan bukan sahaja dengan mengenakan hukuman penjagaan seperti yang dinyatakan di dalam undang-undang tetapi dengan menggalakkan untuk mendorong pesalah untuk berubah

daripada cara jenayah kepada kehidupan yang jujur (lihat perenggan 10–11).

(2) Hujahan yang dikemukakan oleh perayu berkenaan motosikal yang ditunggang oleh responden yang dilaporkan dicuri tidak boleh diterima sebagai faktor relevan untuk dipertimbangkan dalam menjalankan hukuman yang dikenakan bagi kes ini memandangkan responden bukan dituduh berkaitan motosikal tersebut dan tidak terdapat dapatan kesalahan atau sabitan terhadap responden bagi apa-apa kesalahan berkaitan motosikal tersebut (lihat perenggan 17).

(3) HMS yang bijaksana telah secara betul mempertimbangkan rayuan bersalah dan responden sebagai pesalah pertama adalah faktor pengurangan yang relevan. Mahkamah dipujuk oleh dua faktor pengurangan penting yang mana adalah: responden bukan penjenayah kejam memandangkan dia tidak mempunyai latar belakang jenayah sebelum ini; dan tujuan (walaupun salah di sisi undang-undang) adalah akibat kepada ketakutan yang digambarkan oleh responden yang mengasimilasikan pengalaman trauma terseksa sebelumnya kerana dirompak semasa berkerja mencari pendapatan. Oleh itu, untuk mencapai keseimbangan betul di antara pencegahan dan pemulihan, HMS yang bijakasana telah secara betul mempertimbangkan potensi pemulihan responden (lihat perenggan 16 & 20).

(4) Perintah yang dibuat oleh HMS yang bijaksana dalam melepaskan responden dengan jaminan berkelakuan baik di bawah s 294 Kanun adalah memadai dan wajar dalam keadaan kes ini memandangkan ia juga memberi pengajaran kepada responden dan untuk mengajarnya untuk tidak membawa atau memiliki senjata berbahaya di kawasan awam tanpa kebenaran atau tujuan sah (lihat perenggan 19).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 506–575.

Cases referred to

Chandra Sekaran a/l Ramiyah & Anor v PP [2000] 3 MLJ 649; [2000] 3 CLJ 293, CA (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Lee Chow Meng v PP [1976] 1 MLJ 287 (refd)
Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167; [1987] 2 CLJ 405, SC (refd)
Mohammad Faizal bin Sabtu v PP [2012] 4 SLR 947, HC (refd)
Ng Chwee Puan v Reg [1953] 1 MLJ 86 (refd)
Nor Afizal bin Azizan v PP [2012] 6 MLJ 171; [2012] 6 CLJ 370, CA (folld)

A *PP v Hassan Ali a/l Abdul Razak* [2016] 12 MLJ 283; [2016] 9 CLJ 584, HC (refd)
PP v Lee Ah Sam (F) [1949] 1 MLJ 236 (refd)
PP v Md Rashid bin Harun [2000] 3 MLJ 503; [2000] 3 CLJ 832, HC (refd)
PP v Wahab [1964] 1 MLJ 265 (refd)
B *Wong Keng Liang v PP* [2013] 4 MLJ 263, CA (refd)
Yong Pak Yong v PP [1959] 1 MLJ 176 (refd)

Legislation referred to

C Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 6(1)
Criminal Procedure Code s 294, 294(1)

Rozana bt Husin (State Deputy Public Prosecutor, State Legal Advisor's Office) for the appellant.
KA Ramu (KA Ramu Vasanthi & Assoc) for the respondent.
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Zulkifli Bakar J:

BACKGROUND

E **[1]** This is an appeal filed by the public prosecutor ('the appellant') against the inadequacy of the sentence/order imposed by the learned sessions court judge ('the trial judge'). The accused ('the respondent') was released on bond of good behaviour under s 294(1) of the Criminal Procedure Code ('the CPC') for a period of five years commencing from 2 June 2016 with one surety and providing security of RM3,000.
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[2] I heard the appeal and dismissed it. I shall now give my reasons as below.

G **[3]** At the sessions court, the respondent was charged under s 6(1) of Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('the Act') as follows:

> Charge:
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> H Bahawa kamu pada 18/5/2016 jam lebih kurang 1000 hrs, di Jalan Jed 4, Bandar Parklands, di dalam daerah Klang, di dalam negeri Selangor, didapati dalam milik kamu senjata berbahaya iaitu sebilah pedang berhulu kayu panjang berukuran lebih kurang 45 cm, tanpa maksud yang sah. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 6(1) Akta Bahan-bahan Kakisan dan Letupan dan
> I Senjata Berbahaya 1958 (Akta 357) dan boleh dihukum di bawah seksyen yang sama.

[4] I reproduced the salient facts that had been captured by the learned trial judge in her grounds of judgment as described in the following:

7. On 18 May 2015, at about 22.00 hours near Bandar Parklands Klang, the complainant and his team during Operasi Cegah Jenayah had seen a motorcycle bearing registration plate No WB 659 C ridden by the accused in suspicious manner. The complainant introduced himself to the accused but the accused sped off trying to escape to a nearby shoplots.

8. With the assistance of the URB Klang Selatan, the accused eventually got arrested.

9. A body search on the accused led to the discovery of a wood-hilted sword at his waist. (At p 9, appeal record, Vol 1).

[5] On the last 2 June 2016, the respondent, represented by his counsel, had pleaded guilty to the charge as above. This court noted that the learned trial judge had considered the respondent's mitigation before the said order was handed down. The respondent pleaded with the learned trial judge to not imposing the imprisonment sentence.

[6] The learned trial judge then found the respondent guilty and made the order against the respondent as above-mentioned. The learned deputy public prosecutor contended that the sentence passed did not commensurate with the crime that had been committed by the respondent and hence this appeal.

AT THE APPEAL IN THIS COURT

Discretion of the court

[7] According to the appellant, it is for the public interests which is paramount that requires the appellant to press for the mandatory imprisonment sentence of minimum five years to be given by this court since public interests supersede the individual interest. The appellant contended that there was failure of the learned trial judge in not taking into account the public interests when imposing the said sentence or order (*Chandra Sekaran a/l Ramiyah & Anor v Public Prosecutor* [2000] 3 MLJ 649; [2000] 3 CLJ 293; *Public Prosecutor v Md Rashid bin Harun* [2000] 3 MLJ 503; [2000] 3 CLJ 832).

[8] The appellant emphasised to this court that the amendment made to s 6(1) of the Act which was in force from 2 July 2014 ought to be complied strictly by this court that is, upon conviction, the court sentences the respondent with the imprisonment of not less than five years and not more than ten years, and to whipping.

[9] I reiterate as I did in the case of *Public Prosecutor v Hassan Ali a/l Abdul Razak* [2016] 12 MLJ 283; [2016] 9 CLJ 584 wherein this court had dealt with the same subject matter that the words 'be liable' used in the said s 6(1) of

A the Act had in fact allowed this court with a discretion to pass a sentence as it thinks fit since the imprisonment term provided therein is not mandatory to be imposed upon conviction under the said section (*Ng Chwee Puan v Reg* [1953] 1 MLJ 86; *Public Prosecutor v Wahab* [1964] 1 MLJ 265; *Public Prosecutor v Lee Ah Sam (F)* [1949] 1 MLJ 236; *Jayanathan v Public Prosecutor* [1973] 2 MLJ
B 68).

[10] This court found no reason to interfere with the discretion exercised by the learned trial judge sparingly in this regard since the deputy public
C prosecutor failed to prove to this court that the discretion in question was exercised unjustly and injurious to the public interests.

[11] In my considered judgment, 'interests of the public' is best served not merely by imposing custodial sentence as spelled out in the legislations but by
D encouragement to induce the offender to turn from criminal ways to honest living (*Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37).

[12] It is endowed upon this court with significant discretion to decide before passing sentence to strike a balance between public interests and
E individual interests in order to do justice in the circumstances of the case. Of course the court must not overlook the sentence with deterrent effect to the public especially to the offender of his ilks apart from society's abhorrence against the crime.

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[13] I echoed the judgment of Chan Sek Keong CJ (as he then was) in the case of *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 where His Lordship stated:

> [45] Since the power to prescribe punishments for offences is part of the legislative
G power and not the judicial power (as Commonwealth and US case law shows), it must follow that no written law of general application prescribing any kind of punishment for an offence, *whether such punishment be mandatory or discretionary and whether it be fixed or within a prescribed range, can trespass onto the judicial power. On the contrary, it is the duty of the courts to inflict the legislatively-prescribed*
H *punishments on offenders, exercising such discretion as may have been given to them by the Legislature to select the punishments which they think appropriate.* As Yong Pung How CJ said in *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 ('*Tan Fook Sum*') at [14]:
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> > It is axiomatic that the court must pass sentence according to law: ss 180(n)(ii) and 192(2) of the (Criminal Procedure Code (Cap 68, 1985 Rev Ed)). A
> I 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles: *PP v Jafa bin Daud* [1981] 1 MLJ 315 at p 316. Leaving aside for the moment the ambit of the relevant 'punishable section' in the present case, the application of the 'established judicial principles' really requires the court, where the Legislature's prescriptions

as to punishment are open-ended, to balance the diverse and often competing policy considerations. (Emphasis added.)

[14] Hence, I am of the view that even the courts' power to punish is derived from legislation, the judges will ultimately still be the best and qualified persons in undertaking the task of sentencing the accused person after assessing and considering the relevant judicial established principles of sentencing. For instance, in the case of *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405, the Supreme Court held that:

> In assessing the length of custodial sentence, the *court must look at the overall picture in perspective by considering firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.* The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v Ladd & Tristam* [1975] Crim LR 50; *Encyclopedia of Thomas Current Sentencing Practice* at p 1058:
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> > *We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.* (Emphasis added.)

Mitigating factors

[15] The respondent in his mitigation stated that he is 34 years old, working as a shop assistant with monthly income of around RM1,000 and he is married having one child. The respondent submitted that he is a first offender.

[16] In the criminal justice system, the court should give the appropriate discount to the sentence supposed to be imposed at the end of a full trial after having heard the mitigation. In the present case, this court takes into account the plea of guilty and the respondent being a first offender as relevant mitigating factors, and acknowledged that the learned trial judge had correctly considered these factors in her grounds of judgment. All these had been undertaken by the Court of Appeal in the case of *Wong Keng Liang v Public Prosecutor* [2013] 4 MLJ 263 and I quote:

> [12] *It is trite law that accused's guilty plea is a mitigating factor: see Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 *per Lee Hun Hoe J (B); and Melvani v Public Prosecutor* [1971] 1 MLJ 137; [1971] 1 LNS 78 *per Wee Chong Jin CJ (Singapore)*

A *(as then was) who also considered 'first offender' as another mitigating factor, as has been done by Mohamed Azmi J (later FCJ) in Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315. As alluded to above, learned deputy public prosecutor has taken the position that 'This is the accused's first case in Malaysia'.

B [13] *Generally, the accused's guilty plea also allows the court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have been imposed after a full trial: Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167*, as followed in Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45.

C [14] The sentencing discretion belongs to the court of first instance as the sentencing court: *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 at p 445. (Emphasis added.)

D **[17]** Essentially, this court noted the argument advanced by the deputy public prosecutor in relation to the motorcycle ridden by the respondent was reported to be stolen. Notwithstanding this, it could not be accepted as a relevant factor to be considered in the exercise of imposing sentence for this case since the respondent was not charged in respect of the said motorcycle and there is no findings of guilt or conviction against the respondent for any offence E related to the said motorcycle.

[18] Other than that, the respondent claimed that the sword he brought along was for self-protection as he had trauma being robbed previously. This court found merit in this contention although it cannot be considered as lawful F purpose. In my considered judgment, the respondent's act is probable, that it is not safe for him to earn a living as shop assistant especially during night time in the area of Klang:

(a) G this court takes judicial notice the notorious fact that there has been a rising crimes of robbery and murder in Klang, which constitutes a general knowledge based on media reports and number of cases registered in Klang and Shah Alam's Courts (*Lee Chow Meng v Public Prosecutor* [1976] 1 MLJ 287; *Yong Pak Yong v Public Prosecutor* [1959] 1 MLJ 176);

H (b) in that context, this court recognises that the respondent has provided a sufficient basis for warranting him to be given a second chance with the conviction recorded whilst he is being released under stern warnings not to commit the same offence in future; and

I (c) the respondent is in fact found guilty and convicted. He is not being exonerated of the offence. The custodial or any other sentence spelled out in the said section is being suspended and awaiting him if ever he commits any offence within the period of five years.

CONCLUSION — DECISION AT THIS APPEAL

[19] After having heard the submissions from both counsel and deputy public prosecutor and considered the entire relevant evidence recorded in the present case, this court found the order made by the learned trial judge in releasing the respondent with bond of good behaviour under s 294 of the CPC is sufficient and appropriate in the circumstances of this case as it also gives a lesson to the respondent and to educate him to not bring or have in possession of the dangerous weapon in public without authorisation or lawful purpose. A guidance is made by the Court of Appeal in the decision of *Nor Afizal bin Azizan v Public Prosecutor* [2012] 6 MLJ 171; [2012] 6 CLJ 370:

> [21] At this juncture, we would like to clarify the misconception on the applicability of s 294 of the CPC. *We would like to point out that the orders made under* s 294 of the CPC *do not exonerate the person of the offence that he had committed. The person is in fact convicted of the offence and the conviction will be recorded and will form part of the person's criminal record and will remain there for the rest of that person's life. The effect of such an order was clearly spelled out in the case of Jayanthan v PP* [1973] 2 MLJ 68; [1973] 1 LNS 56*, wherein Ong Hock Sim FJ held that:*
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> > *This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence.*
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> [22] Thus, in the instant case, the appellant was in effect given a suspended prison sentence. *He has to behave himself for a period of five years. If he behaves himself during the five years period, he would escape punishment for his offence. But if he fails to observe the conditions of his bond, he will then be arrested and dealt with for the original offence of rape. Like the learned SCJ, we are hopeful that the suspended sentence would give the appellant another chance in life and that he will 'turn over a new leaf'. If the order of the suspended prison sentence has the effect of rehabilitating him, then public interest has indeed been served and best served.* (Emphasis added.)

[20] Pursuant to the above, I am persuaded by two essential mitigating factors raised, that is the respondent was not a hardened criminal since he has no previous criminal antecedents and the purpose (though unlawful) was due to the fear potrayed by the respondent as a victim who assimilates a previous painful experience of trauma of being robbed whilst earning a living. Therefore, in order to achieve the right balance between deterrence and rehabilitation, the learned trial judge had rightly considered the rehabilitative potential of the respondent in the present case of which I shared the same wisdom.

[21] This appeal is hereby dismissed. The order made by the learned trial judge is affirmed.

Appeal dismissed; order made by learned SCJ affirmed.

Reported by Dzulqarnain Ab Fatar